IN THE SUPREME COURT OF FLORIDA

IAN DECO LIGHTBOURNE,

Appellant,

v. **Case No. SC11-878**

STATE OF FLORIDA,

Appellee.
_____ /

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

This is an appeal from a successive post-conviction proceeding. The trial court summarized Lightbourne's procedural history in the following way:

> On April 25, 1981, this case was presented to a jury which found the Defendant guilty of first degree murder. On May 1, 1981, the Court imposed the death penalty on this Defendant. Upon appeal, the Florida Supreme Court affirmed the decision of the trial court. *Lightbourne v. State,* 438 So. 2d 380 (Fla. 1983). The Defendant's effort to obtain certiorari review by the United States Supreme Court was denied on February 21, 1984. *Lightbourne v. State*, 465 U. S. 1051 (1984). On or about May 31, 1985, the Defendant filed a Motion for Post-Conviction Relief, which was denied by the trial court by order on that same date. The Defendant appealed that order, and the Florida Supreme Court affirmed the summary denial of relief in June of 1985. *Lightbourne v. State*, 471 So. 2d 27 (Fla. 1985). On or about June 3, 1985, a Petition for Writ of Habeas Corpus was filed in federal district court. On August 20, 1986, the federal district court denied the petition. The Eleventh Circuit Court of Appeals affirmed the denial. *Lightbourne v. Dugger*, 829 F.2d 1012 (11th Cir. 1987). The Defendant's effort to obtain certiorari review by the United States Supreme Court was denied on October 31, 1988. *Lightbourne v. Dugger*, 488 U.S. 934 (1988). On or about January 30, 1989, the Defendant filed an Emergency Motion to Vacate Judgment and Sentence pursuant to Rule 3.850, *Fla. R. Crim. P.* On July 20, 1989, the Florida Supreme Court affirmed in part and reversed in part this Court's denial of the motion. *Lightbourne v. Dugger*, 549 So. 2d 1364 (Fla. 1989). The Defendant's effort to obtain certiorari review by the United States Supreme Court was denied on March 19, 1990. *Lightbourne v. Dugger*, 494 U.S. 1039 (1990). On June 16, 1994, the Supreme Court of Florida affirmed this Court's denial of the remanded part of the January 1989 motion. *Lightbourne v. State*, 644 So. 2d 54 (Fla. 1994). The Defendant's effort to obtain certiorari review by the United States Supreme Court was denied on March 27, 1995. *Lightbourne v. Florida*, 514 U.S. 1038 (1995). On July 8, 1999, the Florida

> Supreme Court remanded for an evidentiary hearing regarding this Court's denial of the Defendant's third motion pursuant to *Fla. R. Crim. P.* 3.850 filed on November 17, l994. *Lightbourne v. State*, 742 So. 2d 238(Fla. 1999). Following an evidentiary hearing, this Court again denied the motion. The Florida Supreme Court affirmed the denial on January 16, 2003. *Lightbourne v. State*, 841 So. 2d 431 (Fla. 2003). The Defendant's effort to obtain certiorari review by the United States Supreme Court was denied on November 10, 2003. *Lightbourne v. Florida*, 540 U.S. 1006 (2003). On August 17, 2004, the Florida Supreme Court denied a Petition for Writ of Habeas Corpus. *Lightbourne v. Crosby*, 889 So. 2d 71 (Fla. 2004). The Defendant's effort to obtain certiorari review by the United States Supreme Court was denied on June 13, 2005. *Lightbourne v. Crosby*, 545 U.S. 1120 (2005). On or around February 28, 2006, the Defendant filed a fourth motion to vacate judgment and sentence. On April 16, 2007, the Florida Supreme Court affirmed the denial of this motion. *Lightbourne v. State*, 956 So. 2d 456 (Fla. 2007) (table). On September 10, 2007, after lengthy in court proceedings involving "approximately forty witnesses . . . (and) resulting in a record exceeding 6,500 pages", this Court denied the Defendant's All Writs Petition to Declare Florida's Lethal Injection Procedure Unconstitutional, and on November 1, 2007, the Florida Supreme Court affirmed the denial. *Lightbourne v. McCollum*, 969 So. 2d 326, 330 (Fla. 2007). The Defendant's effort to obtain certiorari review by the United States Supreme Court was denied on May 19, 2008. *Lightbourne v. McCollum*, 553 U.S. 1059 (2008).

(V1, R151-53).

On November 29, 2010, Lightbourne filed a Second Successive Motion to Vacate Judgments of Conviction and Sentence. (V1, R1-30). The State responded. (V1, R31-47). The trial judge held a case management hearing. (V3, R1-29). The successive motion was denied. (V1, R151-58).

In its denial of the successive postconviction motion, the trial judge held:

In the motion currently before the Court, the Defendant alleges that the decision by United States Supreme Court in *Porter v. McCollum*, _ U.S. _, 130 S. Ct. 447 (2009), represents "a fundamental repudiation of the Florida Supreme Court's *Strickland/Brady* jurisprudence, and as such *Porter* constitutes a change in [the] law." Defendant's Motion p. 6-7.

In arguing that *Porter* represents a "fundamental repudiation of the Florida Supreme Court's *Strickland / Brady* jurisprudence" the Defendant analogizes the decision in *Porter* and its relationship to *Strickland v. Washington,* 466 U.S. 668 (1984) to that of *Hitchcock v. Dugger,* 481 U.S. 393 (1987) and its relationship to *Lockett v. Ohio*, 438 U.S. 586 (1978).

In *Lockett v. Ohio,* the U.S. Supreme Court held that mitigating factors in a capital case cannot be limited such that those imposing sentence are precluded from considering "any aspect of a defendant's character or record and any of the circumstances of the offense." *Lockett,* 481 U.S. at 604.

Prior to the U.S. Supreme Court's opinion in *Hitchcock*, the Florida Supreme Court interpreted *Lockett* to mean that a defendant merely have the opportunity to present mitigation evidence during the sentencing phase of a capital murder case. *See, e.g., Songer v. State*, 365 So. 2d 696 (Fla. 1978). However, in *Hitchcock*, the United States Supreme Court stated that the Florida Supreme Court had misunderstood what *Lockett* required, *Hitchcock*, 481 U.S. 393. The *Hitchcock* Court held that a capital sentence [sic] must be free to consider and give effect to any mitigating circumstances that it found, to be present, whether or not the particular mitigating circumstances had been statutorily identified. *Id*.

As noted in the Defendant's Motion, following *Hitchcock*, the Florida Supreme Court found that *Hitchcock* "represents a substantial change in the law" such that it was "constrained to readdress ... *Lockett* claim[s] on [their] merits." *Delap v. Dugger*, 513 So. 2d 659 (Fla. 1987). The Defendant argues that just as *Hitchcock* rejected the Florida Supreme Court's analysis in *Lockett, Porter* has rejected the Florida Supreme Court's analysis and application of *Strickland*.

Nowhere within the *Porter* decision, however, did the U.S. Supreme Court indicate or imply that *Porter* represents "a repudiation of *Strickland* jurisprudence" that would constitute a significant change in law to be applied retroactively. The *Porter* Court merely held that the Florida Supreme Court had erred in holding that the defendant's counsel during the sentencing phase in that particular case was not ineffective for failing to introduce certain mitigating factors that could have altered the sentencing verdict against the defendant. The most logical and objective reading of *Porter* indicates that its holding stems from, and should be confined to, the specific facts of the *Porter* case itself.

Moreover, the Defendant has not cited any cases where either the United States Supreme Court or the Florida Supreme Court has indicated that *Porter* establishes a new fundamental right that is to be applied retroactively. In fact, the Florida Supreme Court has addressed a number of ineffective assistance of counsel claims since *Porter*, using the same *Strickland* framework that the United States Supreme Court used in *Porter*. *See Everett v. State*, _ So. 2d _ (Fla. 2010), 2010 WL 4007643 (Fla. Oct. 14, 2010); *Schoenwetter v. State*, 46 So. 3d 535 (Fla. 2010); *Stewart v. State*, 37 So. 3d 243, 247 (Fla. 2010).

Claims raised in prior post-conviction proceedings cannot: be re-litigated in a successive post-conviction motion unless the defendant can demonstrate that the grounds for relief were not known and could not have been known at the time of earlier proceeding. *See Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003).

The Defendant argues that in light of *Porter*, it is necessary to conduct a new prejudice analysis on both the guilt phase ineffective assistance [sic] counsel claim and the *Brady* claim in this case.

Since *Porter* does not establish a new fundamental right that is to be applied retroactively, the Defendant's claim is barred as untimely. Further, since the substance of the Defendant's pending motion was raised in the Defendant's 1985 post-conviction Motion that was denied by this Court and affirmed by the Florida Supreme Court, the Defendant's pending Motion is denied as inappropriately successive as a matter of law.

> The State also presented the argument that appointed capital collateral counsel is barred from filing successive collateral motions pursuant to Section 27.711, *Fla. Stat.* The Defendant cited *Olive v. Maas,* 811 So. 2d 644 (Fla. 2002), to dispute that contention. (The rules of professional conduct themselves prohibit an attorney from asserting frivolous or successive claims, and claims based. on a change in the law applicable retroactively, or arguing for the expansion or modification of existing law were not claims which would be deemed frivolous, successive, or repetitive). The Court determines that the State's position is based on an overly broad reading of the statutory language, and the State's position is not adopted. This argument is denied.

(V1, R154-56). This appeal follows.

STATEMENT OF THE FACTS

This Court previously summarized the facts of this case in the following way:

> A review of the background of this case is necessary to place Lightbourne's current claims in proper perspective. Lightbourne, a twenty-one-year-old Bahamian immigrant at the time of the crime, is on death row for the 1981 murder of Nancy O'Farrell, the daughter of a thoroughbred horse breeder in Ocala. Lightbourne was found guilty of first-degree murder on the alternate theories of premeditation, felony murder in the commission of a burglary, and felony murder in the commission of a sexual battery. FN1 During the penalty phase, the State put on no additional testimony but relied on the evidence presented during the guilt phase, including the testimony of Chavers and Carson, who testified that Lightbourne admitted raping, murdering and shooting O'Farrell because she could identify him. Their testimony is set out in the Eleventh Circuit's 1987 decision denying habeas relief:
>
> > FN1. The evidence at trial during the guilt phase included pubic hair matching Lightbourne's and semen consistent with his blood type, which were found on the victim's body. There was also testimony that Lightbourne, who had been an employee of O'Farrell's father prior to the crime, was seen with a unique .25 caliber pistol just a

> few days before the crime and was arrested a week after the murder with the weapon still in his possession. A bullet casing found in Lightbourne's automobile matched a bullet casing found at the scene of the crime and in the opinion of the expert witness, the bullet that killed Ms. O'Farrell was fired from Lightbourne's .25 caliber pistol. Lightbourne was also found in possession of a unique necklace later identified as belonging to O'Farrell. Lightbourne told police that both the necklace and gun were his.

Theodore Chavers, a cellmate in the Marion County Jail, testified that [Lightbourne] "knew too much" FN2 about the details of Nancy's death and made some incriminating statements during the course of their conversations. According to Chavers, petitioner made references indicating that he entered Nancy's house, encountered her as she was coming out of the shower, forced her to engage in sexual intercourse, and shot her FN3 despite pleas for mercy. This version of the facts was corroborated by Theophilus Carson, another cellmate in the Marion County Jail. According to Carson, petitioner admitted forcing Nancy to have sex, shooting her because she could identify him, and taking a necklace and some money.

> FN2. "According to Chavers, petitioner knew that the police would find no fingerprints, knew that the telephone wires had been cut, and knew that Nancy was found lying on her back." Lightbourne v. Dugger, 829 F.2d 1012, 1016 n. 2. (11th Cir.1987).

> FN3. "Although Chavers's testimony reveals that petitioner never explicitly admitted killing Nancy, Chavers stated that petitioner never denied it and made statements giving rise to the inference that he took her life." *Id.* at n. 3.

Lightbourne v. Dugger, 829 F.2d 1012, 1016 (11th Cir. 1987). Chavers' testimony related graphic details of what Lightbourne allegedly told him about the sexual assault and murder: that Lightbourne told him he had forced O'Farrell to perform sex acts before murdering her, including forcing her to perform oral sex "over and over," and that she "was begging him not to kill her."

Carson testified that Lightbourne told him that police "had him" for "shooting a bitch," meaning O'Farrell, and that he shot her because "she could identify him."

In mitigation, the defense called only Lightbourne, who testified that he was twenty-one years old, a Bahamian citizen, and a father of three who had never been convicted of a crime as an adult. No other mitigating evidence was presented to the jury.

Following the jury's recommendation, the trial court imposed a sentence of death. In the sentencing order, the trial court found that the murder was committed under the following aggravating circumstances: (1) during the commission of a burglary and sexual battery; (2) for the purpose of avoiding arrest (avoid arrest); (3) for pecuniary gain; (4) that the murder was heinous, atrocious or cruel (HAC); and (5) was committed in a cold, calculated and premeditated manner (CCP).

The trial court's order imposing the death penalty did not specify the precise evidence it relied on in finding that the aggravators had been established. However, during closing arguments, in support for the avoid arrest aggravator, the prosecutor referred to Carson's testimony that Lightbourne told him he killed O'Farrell because she could identify him as support for the avoid arrest aggravator. In affirming the death sentence on appeal, we specifically referred to testimony adduced from Chavers and Carson regarding the aggravators of HAC and commission during a sexual battery and burglary. *See Lightbourne v. State*, 438 So.2d 380, 390–91 (Fla. 1983).

It would appear that the testimony of Chavers and Carson supports at least three of the aggravators found by the trial court — HAC, CCP and committed to avoid arrest. While there may have been other evidence to support them, these aggravators find strong support in the jailhouse informants' testimony.

The trial court found only two mitigators: (1) no significant history of criminal activity and (2) Lightbourne's relative youth at the time of the crime. It found that Lightbourne failed to establish "by evidence any other mitigating circumstances." However, the trial court's order imposing the death penalty stated that it had considered a presentence investigation report revealing that Lightbourne was illegitimate, raised in a

> lower socioeconomic class, and had little or no relationship with his father, who separated from the family when Lightbourne was a young boy. However, the sentencing order did not specifically mention those circumstances.

Lightbourne v. State, 742 So. 2d 238, 240-241 (Fla. 1999).

SUMMARY OF ARGUMENTS

Lightbourne's successive Rule 3.851 motion is time-barred and does not come within any exception to Rule 3.851(d)(2). The motion was an attempt to relitigate his previously-denied penalty phase ineffectiveness of counsel/*Brady* claims under the guise that *Porter v. McCollum*, 130 S. Ct. 447 (2009), is a "change in law" which should be applied retroactively. Despite Lightbourne's insistence to the contrary, *Porter* is no more than the United States Supreme Court's application of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), to the particular facts of that case. The Supreme Court did not hold that the *Porter* decision established a new fundamental constitutional right that is to apply retroactively.

The trial court held Lightbourne's motion untimely, successive, procedurally barred, and facially insufficient.

The patently frivolous nature of the successive motion is further highlighted by the fact that *Porter* was reversed on the prejudice prong analysis. Here, Lightbourne's penalty phase ineffectiveness of counsel/*Brady* claims -– based on the alleged failure to adequately investigate mitigation -- was denied based on

his failure to establish the deficiency prong of *Strickland*. Any attempt to relitigate the prejudice prong is immaterial and irrelevant.

Last, collateral counsel is not authorized to file the instant successive motion. See, § 27.702(1) and § 27.711(1)(c), *Fla. Stat*.

STANDARDS OF REVIEW

Florida Rule of Criminal Procedure 3.851(f)(5)(B) permits summary denial of a successive motion for post-conviction relief without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." *Williamson v. State*, 961 So. 2d 229, 234 (Fla. 2007). This Court reviews the circuit court's decision to summarily deny a successive rule 3.851 motion *de novo*, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively shows that the movant is entitled to no relief. *Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009), *citing State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003); *Fla. R.Crim. P*. 3.851(f)(5)(B).

In order to support summary denial, "the trial court must either state its rationale in the order denying relief or attach portions of the record that would refute the claims." *Nixon v. State*, 932 So. 2d 1009, 1018 (Fla. 2006). Here, as in *Rose v. State*, 985 So. 2d 500 (Fla. 2008), the trial court entered a comprehensive written order setting out the basis for the summary

denial of Lightbourne's successive motion to vacate and providing for meaningful appellate review. *Id., citing Nixon*, 932 So. 2d at 1018.

ARGUMENT

THE TRIAL JUDGE DID NOT ERR IN DENYING THE SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF

Lightbourne raises several issues in this appeal, and asserts an entitlement to relitigate his penalty phase ineffectiveness of counsel/*Brady* claims on the theory that *Porter v. McCollum,* 558 U.S. ---, 130 S.Ct. 447 (2009), changed the *Strickland* prejudice analysis and should be retroactively applied. The only questions properly before this Court are: 1) Did *Porter* change the law and, 2) if so, has the alleged change in law been held to apply retroactively under *Witt v. State*, 387 So. 2d 922 (Fla. 1980)? Because the answer to both questions is no, further review of the issues presented is not warranted.

No court has held that *Porter* established a new fundamental constitutional right that is retroactively applicable. *Porter* does not constitute a change in law cognizable in post-conviction under *Witt v. State*, 387 So. 2d 922 (Fla. 1980). This Court's previous denial of Lightbourne's ineffectiveness claims was not premised upon any misreading or misapplication of *Strickland v. Washington*, 466 U. S. 668 (1984), by this Court.

The trial judge properly rejected Lightbourne's arguments on

retroactivity and concluded:

> *Fla. R. Crim. P*. 3.851(d)(1) provides that "Any motion to vacate judgment of conviction and sentence shall be filed within 1 year after the judgment and sentence become final." Subsection (d)(2)(B) provides that no motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subsection (d)(1) unless one of three exceptions is met. The only exception potentially pertinent to this claim is the second exception which provides that "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(I) and has been held to apply retroactively."
>
> The Florida Supreme Court has held that a change in law can be raised in a postconviction motion if it "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980).
>
> **In the motion currently before the Court, the Defendant alleges** that the decision by United States Supreme Court in *Porter v. McCollum*, _ U.S. _, 130 S. Ct. 447 (2009), represents "a fundamental repudiation of the Florida Supreme Court's *Strickland/Brady* jurisprudence, and as such *Porter* constitutes a change in [the] law." Defendant's Motion p. 6-7.
>
> In arguing that *Porter* represents a "fundamental repudiation of the Florida Supreme Court's *Strickland / Brady* jurisprudence" the Defendant analogizes the decision in *Porter* and its relationship to *Strickland v. Washington,* 466 U.S. 668 (1984) to that of *Hitchcock v. Dugger,* 481 U.S. 393 (1987) and its relationship to *Lockett v. Ohio*, 438 U.S. 586 (1978).
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> In *Lockett v. Ohio,* the U.S. Supreme Court held that mitigating factors in a capital case cannot be limited such that those imposing sentence are precluded from considering "any aspect of a defendant's character or record and any of the circumstances of the offense." *Lockett,* 481 U.S. at 604.
>
> Prior to the U.S. Supreme Court's opinion in *Hitchcock*, the Florida Supreme Court interpreted *Lockett* to mean

that a defendant merely have the opportunity to present mitigation evidence during the sentencing phase of a capital murder case. *See, e.g., Songer v. State*, 365 So. 2d 696 (Fla. 1978). However, in *Hitchcock*, the United States Supreme Court stated that the Florida Supreme Court had misunderstood what *Lockett* required, *Hitchcock*, 481 U.S. 393. The *Hitchcock* Court held that a capital sentence must be free to consider and give effect to any mitigating circumstances that it found, to be present, whether or not the particular mitigating circumstances had been statutorily identified. *Id*.

As noted in the Defendant's Motion, following *Hitchcock*, the Florida Supreme Court found that *Hitchcock* "represents a substantial change in the law" such that it was "constrained to readdress ... *Lockett* claim[s] on [their] merits." *Delap v. Dugger*, 513 So. 2d 659 (Fla. 1987). The Defendant argues that just as *Hitchcock* rejected the Florida Supreme Court's analysis in *Lockett, Porter* has rejected the Florida Supreme Court's analysis and application of *Strickland*.

Nowhere within the *Porter* decision, however, did the U.S. Supreme Court indicate or imply that *Porter* represents "a repudiation of *Strickland* jurisprudence" that would constitute a significant change in law to be applied retroactively. The *Porter* Court merely held that the Florida Supreme Court had erred in holding that the defendant's counsel during the sentencing phase in that particular case was not ineffective for failing to introduce certain mitigating factors that could have altered the sentencing verdict against the defendant. The most logical and objective reading of *Porter* indicates that its holding stems from, and should be confined to, the specific facts of the Porter case itself.

Moreover, the Defendant has not cited any cases where either the United States Supreme Court or the Florida Supreme Court has indicated that *Porter* establishes a new fundamental right that is to be applied retroactively. In fact, the Florida Supreme Court has addressed a number of ineffective assistance of counsel claims since *Porter*, using the same *Strickland* framework that the United States Supreme Court used in *Porter*. *See Everett v. State*, _ So. 2d _ (Fla. 2010), 2010 WL 4007643 (Fla. Oct. 14, 2010); *Schoenwetter v. State*, 46 So. 3d 535 (Fla. 2010); *Stewart v. State*, 37 So. 3d 243, 247 (Fla. 2010).

> Claims raised in prior post-conviction proceedings cannot: be re-litigated in a successive post-conviction motion unless the defendant can demonstrate that the grounds for relief were not known and could not have been known at the time of earlier proceeding. *See Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003). The Defendant argues that in light of *Porter*, it is necessary to conduct a new prejudice analysis on both the guilt phase ineffective assistance counsel claim and the *Brady* claim in this case.
>
> Since *Porter* does not establish a new fundamental right that is to be applied retroactively, the Defendant's claim is barred as untimely. Further, since the substance of the Defendant's pending motion was raised in the Defendant's 1985 post-conviction Motion that was denied by this Court and affirmed by the Florida Supreme Court, the Defendant's pending Motion is denied as inappropriately successive as a matter of law.

(V2, R180-184) (emphasis added). The trial court's order summarily denying Lightbourne's successive motion to vacate should be affirmed.

Lightbourne's successive Rule 3.851 motion is time-barred and does not meet any exception under Rule 3.851(d)(2)(B).

Florida Rule of Criminal Procedure 3.851(d)(2)(B) requires any motion to vacate judgment of conviction and death sentence to be filed within one year after the judgment and sentence become final, unless the motion alleges that a fundamental constitutional right was established after that period and "has been held to apply retroactively." *Fla. R. Crim. P.* 3.851(d)(2)(B).[1] Lightbourne's

[1] The use of the past tense in a rule conveys the meaning that an action has already occurred. *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000). Thus, Lightbourne could not plausibly invoke the exception

successive Rule 3.851 motion failed to satisfy both of the prongs required for this exception.

Lightbourne's judgment and sentence became final in 1984, when the Supreme Court denied certiorari. *See, Lightbourne v. Florida*, 465 U.S. 1051 (1984); *Fla. R. Crim. P.* 3.851(d)(1)(B) (judgment becomes final "on the disposition of the petition for writ of certiorari by the United States Supreme Court"). Lightbourne's successive Rule 3.851 motion, filed in 2010, is untimely filed - by 27 years.[2] Although there is an exception to the time limitation in 3.851(d)(2)(B) which would restart the clock for a new fundamental constitutional right that has been held to apply retroactively, ***Porter* is not a new right**.

Porter is not a retroactive change in law.

Porter is merely the application of *Strickland* to the facts of that particular case -- it does not provide any cognizable basis to relitigate Lightbourne's penalty phase ineffectiveness/*Brady* claim anew. *Porter* did not change the application of the ineffective

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in *Fla. R. Crim. P*. 3.851(d)(2)(B). Instead, Lightbourne had to show that a new fundamental constitutional right was established and has been held retroactive for the exception to apply. *See Tyler v. Cain*, 533 U.S. 656 (2001) (holding that use of past tense in federal statute regarding successive federal habeas petitions requires Court to hold new rule retroactive before it can be relied upon).

[2] Lightbourne does not assert any claim of newly discovered evidence based on *Porter*. In any event, the Florida Supreme Court has rejected *Porter* as the basis for a newly discovered evidence claim.

assistance of counsel analysis under *Strickland*. Moreover, this Court has not been misapplying *Strickland*'s standard of review – the standard of review announced in *Stephens* is expressly compelled by *Strickland*. In addition, even if Lightbourne could somehow demonstrate that *Porter* represents both a "change in law" and satisfies the requirements for retroactivity under *Witt,* which the State emphatically disputes, Lightbourne's attempt to relitigate the prejudice prong is immaterial because this Court previously denied Lightbourne's penalty phase ineffectiveness/*Brady* claim -– based on the alleged failure to adequately investigate mitigation -- on the **deficiency** prong of *Strickland*.

No court has held that *Porter* established a new fundamental constitutional right that is to be applied retroactively. Since *Porter* was decided, both this Court and the federal courts, including the United States Supreme Court, have uniformly reinforced the application of *Strickland* to claims of ineffective assistance of counsel.[3] *See, Harrington v. Richter*, 131 S.Ct. 770

Grossman v. State, 29 So. 3d 1034, 1042 (Fla. 2010).

[3] *Porter* is squarely based on *Strickland*. See *Porter*, 130 S. Ct. at 452. This Court has recognized that *Porter* does not change the application of the ineffective assistance of counsel analysis under *Strickland.* See, *Everett v. State*, 54 So. 3d 464, 472 (Fla. 2010); *Schoenwetter v. State*, 46 So. 3d 535 (Fla. 2010); *Stewart v. State*, 37 So. 3d 243, 247 (Fla. 2010); *Rodriguez v. State*, 39 So. 3d 275, 285 (Fla. 2010); *Troy v. State*, 57 So. 3d 828, 836 (Fla. 2011); *Franqui v. State*, 2011 WL 31379, 8 (Fla. 2011). The Eleventh Circuit has also applied, and distinguished, *Porter*. *See, Reed v. Secretary, Florida Dept. of Corrections,* 593 F. 3d 1217, 1243 n. 16, and 1246 (11th Cir. 2010); *Boyd v. Allen*, 592 F. 3d 1274, 1302

(2011); *Premo v. Moore*, 131 S.Ct. 733 (2011); *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011); *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010); *Renico v. Lett*, 130 S.Ct. 1855 (2010); *Sears v. Upton*, 130 S.Ct. 3259 (2010).

Applying Rule 3.851(d) to Lightbourne's dual burden under *Strickland*, Lightbourne would have to show that *Porter* established a new fundamental constitutional right on *both* prongs of *Strickland* and that this new right has been held to apply retroactively. In *Witt*, 387 So. 2d at 929-30, this Court set out the standard for determining whether retroactivity was warranted. Under this standard, a defendant can only obtain retroactive application of a new rule if he shows that the United States Supreme Court or Florida Supreme Court has made a significant change in constitutional law, which so drastically alters the underpinnings of a defendant's death sentence that "obvious injustice" exists. *New v. State*, 807 So. 2d 52 (Fla. 2001). This Court has stated that new cases that merely refine or apply the law do not qualify. *Witt*, 387 So. 2d at 929-30. *Porter* does not even rise to that level.

A court considering retroactivity under *Witt* looks at three factors: (1) the purpose served by the new case; (2) the extent of reliance on the old law; and (3) the effect on the administration of justice from retroactive application. *See Ferguson v. State*,

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(11th Cir. 2010).

789 So. 2d 306, 311 (Fla. 2001) (applying retroactively *Carter v. State*, 706 So. 2d 873 (Fla. 1997) where this Court held that a judicial determination of competency is required in certain capital post-conviction cases); *Johnston v. Moore*, 789 So. 2d 262 (Fla. 2001) (declining to apply retroactively *Stephens v. State*, 748 So.2d 1028 (Fla. 1999), wherein this Court announced a revised standard of review for ineffectiveness claims); *Chandler v. Crosby*, 916 So.2d 728, 729-730 (Fla. 2005) (concluding that all three factors in the *Witt* analysis weighed against the retroactive application of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004) and emphasizing that the new rule did not present a more compelling objective that outweighs the importance of finality) *Id*. at 729-730, *citing State v. Glenn*, 558 So. 2d 4, 7 (Fla. 1990).

Even if *Porter* could be said to be a change in the law, it would still not be retroactive under *Witt.* Lightbourne recites these three factors but makes no attempt to explain how the alleged "change in law" in *Porter* satisfies any of these factors.[4] It is

[4] It appears that the purpose of "new" law, as construed by Lightbourne, would be to never give the findings of the trial court any deference, but only to have the appellate court "engage with the evidence" in the first instance. As for reliance on the "old" law, Lightbourne evidently contends that this Court has been misapplying *Strickland* for decades by giving deference to the trial court's findings of fact. Both of these apparent suggestions by the defense are patently incorrect. As noted, *infra*, by independently reviewing mixed questions of law and fact, the appellate court is engaging with the evidence. Giving deference to the trial court's findings of fact and independently reviewing mixed questions of law and fact is consistent with *Strickland*.

not enough to assert a new case has issued. *Witt* is in reality a rule of non-retroactivity; cases are not presumed to apply retroactively. A litigant seeking retroactive application bears the burden of demonstrating how the *Witt* factors are satisfied. Because Lightbourne has failed to carry his burden, the request for retroactive application of *Porter* should be denied.

Moreover, Lightbourne ignores the fact that this Court found that the change of law in *Stephens* --the applicable standard of review of ineffectiveness claims**-- did not satisfy *Witt* and was not retroactive.** *Johnston v. Moore*, 789 So. 2d 262, 267 (Fla. 2001).

In *Johnston* this Court applied the principles of *Witt* and concluded that *Stephens* was not a change in the law that should have retroactive application. As *Johnston* explained, "this Court in *Stephens* sought to clarify any confusion resulting from the use of different language in various opinions analyzing ineffective assistance of counsel claims. In so doing, this Court reaffirmed its prior decision in *Rose v. State*, 675 So.2d 567 (Fla.1996), wherein this Court stated that an ineffective assistance of counsel claim is a mixed question of law and fact, subject to plenary review based on *Strickland." Id.* at 267.

Since appellant is asserting that the same law has changed here, the alleged change would not be retroactive. The courts of

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Finally, the effect on the administration of justice would be overwhelming.

this state have extensively relied upon the *Stephens* standard of review. And, the effect on the administration of justice would be overwhelming. If *Porter* is ruled retroactive, defendants will file untimely and successive motions for post conviction relief seeking to relitigate claims of ineffective assistance. The courts of this State would be required to review stale records to reconsider these claims. See *State v. Glenn*, 558 So. 2d 4, 8 (Fla. 1990) (refusing to apply *Carawan v. State*, 515 So. 2d 161 (Fla. 1987), retroactively). As such, *Porter* would not satisfy *Witt* even if it had changed the law. Thus, the motion is untimely and should be denied as such.

Instead of actually presenting a *Witt* analysis of the alleged change in *Porter*, Appellant merely asserts that *Porter* should be retroactive because *Hitchcock v. Dugger*, 481 U.S. 393 (1987), was held to be retroactive. (Initial Brief at 42-43, citing *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987), *Delap v. Dugger*, 513 So. 2d 659 (Fla. 1987), *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987), *Thompson v. Dugger*, 5151 So. 2d 173 (Fla. 1987), *Demps v. Dugger*, 514 So.2d 1092 (Fla. 1987). However, in making this comparison, Appellant ignores the difference between the law the change in *Hitchcock* and the alleged change here. In *Hitchcock*, the Court invalidated a jury instruction finding that it unconstitutionally precluded consideration of mitigation. *Id.* at 398-99. As such, a determination of whether *Hitchcock* error had

occurred was easily made by simply reviewing the jury instructions and was limited to only those cases in which a defendant had been sentenced to death. In contrast, the change in law that Appellant asserts occurred here involves reviewing fact-specific claims of ineffective assistance of counsel to determine if an error even occurred and doing so in all criminal cases. Given this difference in the application of the *Witt* factors, the mere fact that *Hitchcock* was found to be retroactive does not show that the alleged change in law here is. As such, Appellant's reliance on the retroactivity of *Hitchcock* is misplaced. Lightbourne has not identified any case in which *Porter* has been declared a change in law which is retroactive. Thus, Lightbourne's successive motion to vacate was unauthorized and facially insufficient.

The trial judge correctly denied all relief in this case. Nowhere in the *Porter* decision did the United States Supreme Court ever indicate or imply that *Porter* represents a significant change in law to be applied retroactively. Lightbourne has failed to meet any of the prongs of the retroactivity test. Neither the United States Supreme Court nor this Court deemed *Porter* a change of law. It is not new law and there is no miscarriage of justice. "Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Strickland,* at 2069. *Porter* is very fact-specific and the Supreme Court certainly did not find every

decision of this Court regarding ineffective assistance of counsel to be unreasonable.

As practical matter, there probably will always be some "newer" United States Supreme Court case addressing claims of ineffective assistance of counsel. Indeed, in 2009, the same year that *Porter* was decided, the United States Supreme Court also issued a series of other decisions addressing *Strickland* claims -- *Knowles v. Mirzayance*, 129 S.Ct. 1411 (2009), *Bobby v. Van Hook*, 130 S.Ct. 13 (2009) and *Wong v. Belmontes*, 558 U.S. ––––, 130 S.Ct. 383 (2009). However, a criminal defendant may not relitigate previously-denied *Strickland* claims simply because there are more recent decisions addressing claims of ineffective assistance of counsel. In *Marek v. State*, 8 So. 3d 1123 (Fla. 2009), this Court rejected a similar attempt to relitigate a death-sentenced inmate's penalty phase ineffectiveness claim under the guise of recently decided caselaw. In *Marek*, the defendant argued that his previously raised claim that trial counsel failed to conduct an adequate investigation of Marek's background for penalty phase mitigation should be re-evaluated under the standards enunciated in *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456 (2005), *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003), and *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495 (2000). Marek argued that these cases modified the standard of review for claims of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668,

104 S.Ct. 2052 (1984). This Court decisively rejected Marek's attempt to relitigate his previously-denied *Strickland* claims. *See Marek*, 8 So. 3d at 1128 (concluding that "the United States Supreme Court in these cases did not change the standard of review for claims of ineffective assistance of counsel under *Strickland*"). Here, as in *Marek*, the existence of a "newer" case applying *Strickland* does not equate with a change in the law which is retroactive.

Porter did not change the standard of review and this Court has not been misapplying *Strickland*'s standard of review. Lightbourne's claim is legally insufficient and without merit.

***Porter* is limited to the facts in that case.**

In *Porter v. McCollum*, the state courts did not decide whether *Porter*'s counsel was deficient under *Strickland*. As a result, the United States Supreme Court assessed the first prong of *Porter*'s penalty phase ineffectiveness claim *de novo*. *Porter*, 130 S.Ct. at 452. The United States Supreme Court found that trial counsel failed to uncover and present any evidence of Porter's mental health or mental impairment, his family background, or his military service; and, "although Porter may have been fatalistic or uncooperative," that did not "obviate the need for defense counsel to conduct some sort of mitigation investigation." *Porter*, 130 S.Ct. at 453. The United States Supreme Court determined that trial counsel was deficient under the first prong of *Strickland* and

emphasized that if *Porter*'s counsel had been effective, the judge and jury would have learned of "(1) Porter's heroic military service in two of the most critical - and horrific - battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling." *Porter*, 130 S.Ct. at 454.

In addressing this Court's adjudication of the second – prejudice - prong of *Strickland*, the United States Supreme Court reiterated that the test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. And, "[t]o assess that probability, [the Court] consider[s] the totality of the available mitigation evidence - both that adduced at trial, and the evidence adduced in the habeas proceeding - and reweigh[s] it against the evidence in aggravation." *Porter*, 130 S.Ct. 447, 453-54 (quotation marks and brackets omitted). The United States Supreme Court ruled that this Court's decision that *Porter* was not prejudiced by his counsel's failure to conduct a thorough - or even cursory - investigation was unreasonable because it "either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing." *Porter*, 130 S.Ct. at 454-455. For example, the mental health evidence, which included Dr. Dee's

testimony regarding the existence of a brain abnormality and cognitive defects, was not considered in this Court's discussion of nonstatutory mitigation. *Porter*, 130 S.Ct. at 455, n. 7. In addition, the United States Supreme Court found that this Court unreasonably discounted evidence of *Porter*'s childhood abuse and combat military service.[5]

The fundamental constitutional right at issue in *Porter* was the Sixth Amendment right to effective assistance of counsel, a constitutional right that had been established decades before in *Strickland* v. Washington, 466 U.S. 668, 104 S.Ct. 2052, (1984). *Porter* was merely an application of the *Strickland* standard to a particular case.

Lightbourne's claim is procedurally barred.

No exception to the time bar exists. Lightbourne merely reargues the facts adduced in the prior postconviction proceeding. Those issues were decided by this Court no later than 1999, and are procedurally barred. Lightbourne previously raised the same claim of ineffective assistance of counsel/*Brady* that he seeks to

[5] In *Reed v. Secretary, Florida Dept. of Corrections*, 593 F. 3d 1217 (11th Cir. 2009), the Eleventh Circuit distinguished *Porter* on the basis of the "uniquely strong" mitigating nature of Porter's military service in combat. *Reed*, 593 F. 3d at 1249, n. 21 (noting ". . . Paragraph after paragraph in the *Porter* opinion concerns Porter's combat experience in Korea, recounted in great detail. *Id*. at 449-51, 455. The diagnosis in *Porter* was post-traumatic stress disorder from combat, not antisocial personality disorder. *Id*. at 450 n. 4, 455 & n. 9. Porter's military service was critical to the holding in *Porter*.

relitigate here. As this Court has held, such attempts to relitigate claims that have previously been raised and rejected are procedurally barred. *See Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003). Under the law of the case doctrine, Lightbourne cannot relitigate a claim that has been denied by the trial court and affirmed by the appellate court. *State v. McBride*, 848 So. 2d 287, 289-290 (Fla. 2003). It is also well established that piecemeal litigation of claims of ineffective assistance of counsel is clearly prohibited. *Pope v. State*, 702 So. 2d 221, 223 (Fla. 1997); *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996). Since this is precisely what Lightbourne is attempting to do here, his penalty phase ineffectiveness/*Brady* claim is barred and was correctly denied. *See Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004) (discussing application of *res judicata* to claims previously litigated on the merits).

Penalty phase ineffectiveness.

In an attempt to relitigate the denial of relief under *Strickland,* Lightbourne sets out a one-page argument on pages 36-37 of his brief. That conclusory argument is insufficient to present a claim or review. *Bowles v. State/McNeil*, 979 So. 2d 182, 192 (Fla. 2008) ("because Bowles' conclusory arguments on ineffective assistance of counsel are insufficient and an attempt to relitigate issues that are procedurally barred, we deny relief on this claim."). In any event, *Porter* did not address, much less change,

the appellate standard of review of factual findings. In fact, the United States Supreme Court never even mentioned the standard of review for factual findings in *Porter*. See *Porter*, 130 S. Ct. at 448-56. In *Strickland*, the United States Supreme Court stated that reviewing courts are required to give deference to factual findings made in resolving claims of ineffective assistance of counsel and then review the rejection of the claim *de novo.* *Strickland*, 466 U.S. at 698. The United States Supreme Court addressed the extent to which the appellate or federal courts review the findings of the trial court and explained:

> Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d), and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

Strickland, 466 U.S. at 698, 104 S.Ct. at 2070.

In this Court's decision in *Porter*, 788 So. 2d at 923, this Court cited *Stephens v. State,* 748 So. 2d 1028, n.2 (Fla. 1999) and stated that while the factual findings of the lower court should be given deference, the appellate court independently reviews mixed question of law and fact. This standard was repeated in *Lightbourne v. State,* 967 So.2d 131, 141 (Fla. 2007). The *Stephens* standard of review is expressly compelled by *Strickland*. This Court has not been misapplying *Strickland*'s standard of review. Giving deference

to the lower court findings of fact and independently reviewing mixed questions of law and fact is consistent with *Strickland*. Since the standard utilized by this Court in *Porter* is the same standard the United States Supreme Court enunciated in *Strickland*, there is no change in law. Because there has been no change in law, Lightbourne failed to meet any exception under *Fla. R. Crim. P*. 3.851(d)(2)(B).

Lightbourne, nevertheless, suggests that because *Sochor v. State*, 883 So. 2d 766 (Fla. 2004) cited to *Porter*, this Court's analysis in *Sochor* must have been flawed. (Initial Brief at 35). *Sochor* cited to *Porter* as a case which also involved conflicting expert opinions and in connection with its finding "that the circuit court's decision to credit the testimony of the State's mental health experts over the testimony of Sochor's new experts is supported by competent, substantial evidence. *Sochor*, 883 So. 2d at 783, *citing Porter*. Again, this finding is in accordance with the mixed standard of review applied in *Strickland*.

In addition, this Court has refused to allow relitigation of previously denied *Strickland* claims under the guise of more recent caselaw. *See, Marek*, 8 So. 3d at 1128. In other words, this Court has previously determined that the alleged "changes in law" suggested by Lightbourne do not satisfy *Witt.*

As previously noted, the revised standard of appellate review approved in *Stephens*, for claims of ineffective assistance of

counsel was held to not be retroactive under *Witt* in *Johnston v. Moore*, 789 So. 2d 262, 267 (Fla. 2001). The courts of this state have extensively relied upon the *Stephens* standard of review and continue to do so today. *See Troy v. State*, 57 So. 3d 828, 834 (Fla. 2011) (stating, "[b]ecause ineffective assistance of counsel claims present mixed questions of fact and law, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent substantial evidence, but reviewing the circuit court's legal conclusions de novo. *See Sochor v. State*, 883 So.2d 766, 771–72 (Fla. 2004) (*citing Stephens v. State*, 748 So.2d 1028, 1033 (Fla. 1999))." Thus, if *Porter*, as construed by Lightbourne, is deemed a retroactive "change" in the law, the effect on the administration of justice would be overwhelming.

Lightbourne's reliance on *Sears v. Upton*, 130 S. Ct. 3259 (2010) also is misplaced. In *Sears*, the Georgia post-conviction court found trial counsel's performance deficient under *Strickland*, but then stated that it was unable to assess whether counsel's inadequate investigation might have prejudiced Sears. *Id.* at 3261. In *Sears*, the United States Supreme Court did not find that it was improper for a trial court to make factual findings in ruling on a claim of ineffective assistance of counsel or for a reviewing court to defer to those findings. Instead, the Supreme Court reversed because it did not believe that the lower courts had made findings

about the evidence presented. *Id*. at 3261. *Sears* does not support the assertion that the making of findings or giving deference in reviewing findings is inappropriate.

Lightbourne is not entitled to relief.

Even if *Porter* arguably changed the law and the alleged change was retroactive and the claim was not procedurally barred, which the State emphatically disputes, Lightbourne still would not be entitled to any relief. As this Court recognized in *Witt*, a defendant is not entitled to relief based on a change in law, where the change would not affect the disposition of the claim. *Witt,* 387 So. 2d at 930-31. As the United States Supreme Court recognized in *Strickland*, there is no reason to address the prejudice prong if a defendant fails to show that his counsel was deficient. *Strickland*, 466 U.S. at 697.

Any other issue Lightbourne may attempt to argue that was not properly raised in the lower court cannot be argued on appeal. *See Henyard v. State,* 992 So. 2d 120, 126, n2 (Fla. 2008) (claim not raised below not properly raised for review by this Court); *Perez v. State*, 919 So. 2d 347, 359 (Fla.2005) (to preserve for appeal, issue "must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation"). Likewise, any issue generally alleged which is not specifically briefed on appeal is waived. *See Cooper v. State*, 856 So. 2d 969, 977 n. 7 (Fla. 2003) ("Cooper ... contend[s], without

specific reference or supportive argument, that the 'lower court erred in its summary denial of these claims.' We find speculative, unsupported argument of this type to be improper, and deny relief based thereon."); *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues.").

Ineffective assistance of counsel – mitigation.

Regarding the mitigation ineffectiveness claim, this Court upheld the rejection of that claim in the prior postconviction proceeding. Lightbourne fails to explain how, since counsel was not deficient, any misapplication of the *Strickland* prejudice standard would impact his case. *Troy v. State*, 57 So.3d 828, 834 (Fla. 2011) ("To successfully prove a claim of ineffective assistance of counsel, both prongs of the *Strickland* test must be satisfied."). In *Porter*, there was no finding by the state court's on the deficiency prong and the Supreme Court analyzed the deficiency prong *de novo.* Here, as outlined above, the state courts found no deficient performance of Lightbourne's counsel after a thorough analysis of the facts and law. Lightbourne cannot meet the deficiency prong of *Strickland*; thus, there is no ineffectiveness and this appeal is patently frivolous.

As previously noted, under the law of the case doctrine,

Lightbourne cannot relitigate a claim that has been denied by the trial court and affirmed by the appellate court. *State v. McBride*, 848 So. 2d 287, 289-290 (Fla. 2003). In addition, finding no deficiency is in accordance with United States Supreme Court precedent. *See Bobby v. Van Hook*, 130 S. Ct. 13, 19 (2009) (finding that, as in *Strickland*, defense counsel's "decision not to seek more" mitigating evidence from the defendant's background "than was already in hand" fell "well within the range of professionally reasonable judgments.") As a result, Lightbourne's claim would be meritless even if *Porter* somehow changed the law and applied retroactively. Regardless, *Porter* is distinguishable on its facts for the reasons set out above.

Collateral Counsel was not authorized to file this successive motion to vacate.

Pursuant to §27.702, "[t]he capital collateral regional counsel and the attorneys appointed pursuant to s. 27.710 shall file only those postconviction or collateral actions authorized by statute." The Florida Supreme Court has recognized the legislative intent to limit collateral counsel's role in capital post-conviction proceedings. *See State v. Kilgore*, 976 So. 2d 1066, 1068-1069 (Fla. 2007). The lower court was wrong when it did not find this as an additional reason tht the successive motion was improperly filed.

The term "postconviction capital collateral proceedings" is

defined in §27.711(1)(c), *Fla. Stat*., as follows:

> "Postconviction capital collateral proceedings" means one series of collateral litigation of an affirmed conviction and sentence of death, including the proceedings in the trial court that imposed the capital sentence, any appellate review of the sentence by the Supreme Court, any certiorari review of the sentence by the United States Supreme Court, and any authorized federal habeas corpus litigation with respect to the sentence. The term does not include repetitive or successive collateral challenges to a conviction and sentence of death which is affirmed by the Supreme Court and undisturbed by any collateral litigation.

§27.711(1)(c), *Fla. Stat*. Accordingly, CCRC-S was not authorized to file this patently frivolous, repetitive and successive motion.

Lightbourne is not entitled to any relief because collateral counsel is not authorized to file the unauthorized successive motion to vacate, the motion is time-barred, *Porter* did not change the law, any alleged change in law would not apply retroactively and the alleged "change in law" is based on the prejudice prong analysis in *Porter* and would not apply to this defendant because relief on Lightbourne's penalty phase ineffectiveness claim - based on the alleged failure to adequately investigate and present mitigation - previously was denied under the deficient performance prong of *Strickland*. The trial court's order summarily denying Lightbourne's successive motion to vacate should be affirmed.

CONCLUSION

Based on the authorities and arguments herein, the State respectfully requests this Honorable Court affirm the order of the

circuit court and deny all relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Suzanne Myers Keffer**, CCRC-South, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301 this _ day of October, 2011.

_____
Senior Assistant Attorney General

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

_____
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